IN THE SUPREME COUNTY OF MISSOURI

DEANNA MARIE COPELAND,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC94804
	)	
LUCAS WICKS,	)	
	)	
Respondent.	)	

ON TRANSFER FROM THE MISSOURI DOURT OF APPEALS,
EASTERN DISTRICT
APPEAL NO ED101012
ON APPEAL FROM THE CIRCUIT COURT OF LINCOLN
COUNTY MISSOURI
FORTY-FIFTH (45TH) JUDICIAL CIRCUIT
DIVISION 1
THE HONORABLE DAVID ASH
CAUSE NO. 10L6-CC00051

APPELLANT SUBSTITUTE REPLY BRIEF

John D. James
MO Bar #61070MO
Attorney for Appellant
Deanna M. Copeland
14 Richmond Center Court
St. Peters, MO 63376
Tel: (636) 397-2411
Fax: (636) 397-2799
cjlaw@charliejames.com

I. Procedural Complaints

Respondent points out procedural errors made or claimed to have been made by Appellant in her Substitute Brief. First, Respondent correctly points out that Appellant failed to restate each point relied on before the section or sections discussing that point in violation of Rule 84.04(e). Appellant did not restate the points relied upon in her brief primarily because the errors of the Appellate Court's analysis differ markedly from the errors of the trial court. As a result, Appellant's points relied on are valid points of error regarding the trial court's ruling, but provided a difficult framework to adequately address the errors of the Appellate Court, which Appellate felt she must address. Appellant's substitute brief does "substantially follow" the order of the points relied on pursuant to Rule 84.04(e). Essentially, section A relates to Point I; sections B-H relate to Point II; and section I relates to point three. Respondent has not asked for any relief due to the Appellant's not restating the specific points relied on in the body of her substitute brief. But, should this Court determine that this arguable procedural deficiency is fatal to Appellant's appeal, Appellant requests leave to immediately file an amended substitute brief specifically restating each point relied on prior to the sections discussing that point as near as possible given the additional issues raised by the Appellate Court's opinion.

Respondent also complains that Plaintiff's discussions regarding the "star

track" system were not previously argued. This complaint is misplaced for two reasons: 1) it is incongruous with Respondent's contention that malice has always been at issue in its summary judgment motion; and 2) The facts discussed were all included in the record and were only specifically argued here due to the Appellate Court's decision below specifically addressing the malice issue and recommending a remand to supplement the record regarding the issue of malice. Appellant has maintained that malice is an unnecessary issue for the court to address in determining whether or not Respondent is entitled to immunity in this case. Appellant had not previously discussed the issue at any length or with specificity because Appellant believes it is unnecessary to reach that analysis. Because the Appellate Court's decision below indicated that, in their opinion, the issue needed to be addressed, Appellant felt compelled to argue that the current record is sufficient to establish inferences that would allow a reasonable juror to conclude Respondent acted with malice, while maintaining her position that the issue need not be reached.

Appellant must again revisit her repeated and continuous objection to Respondent's attempts to argue the sufficiency of Appellant's evidence regarding the elements of her claims after moving for summary judgment only on the issue of immunity. Respondent's motion for Summary Judgment fails to comply with Rule 74.04(c)(1) (See LF at 36-37) in that Rule 74.04(c)(1) mandates that a movant

shall summarily state his or her grounds for summary judgment. Respondent's motion is devoid of any specific grounds for summary judgment at all. See LF at 36-37. Appellant has repeatedly complained that Respondent's motion failed to comply with the rule, that the only requested relief in Respondent's memo of law in support of his motion for summary judgment was based solely on immunity (see LF at p. 34), and yet Respondent continually appears to comment on and otherwise urge courts to uphold summary judgment in his favor based on a claim that Appellant lacks sufficient evidence to meet her elements. See, e.g., LF. 69-70; Appellant's Reply brief in the Appellate Court below, p. 1 (addressing this issue as a first matter after each filing by Respondent that appeared to argue Appellant lacked sufficient evidence of her elements). The only issue Respondent has brought properly before any court is a claim that he is entitled to immunity, not that Plaintiff is unable to make a submissible case on the elements of her claims. Additionally, the judgment appealed from granted summary judgment because "Defendant is entitled to qualified immunity in this case," not because of any claimed insufficiency of Appellant's evidence regarding the underlying elements. LF p. 89.

Respondent argues that, because Appellant addressed the non-issues Respondent repeatedly raised in his briefs, such issues are properly before this court despite Respondent having only moved for summary judgment on the basis

of immunity. Rule 74.04(c)(1) exists for the exact purpose of providing the non-movant with the issues to be argued so that the non-movant can ensure he or she includes any relevant facts to the issues presented that are disputed or undisputed and to ensure that there is a sufficient record before the courts to deal with the issues raised. By moving for summary judgment without stating a basis for that motion, requesting relief in his trial court brief in support of summary judgment based only on qualified immunity and then subsequently asking courts to uphold summary judgment based on insufficient proof of the underlying elements, Respondent has put Appellant in the exact position Rule 74.04(c)(1) is intended to prevent. Any attempt to hold that Respondent is entitled to summary judgment for any reason other than qualified immunity should be ignored by this court or – at a minimum – result in a remand to the trial court for a supplemented record on such issues.

II. The Correct Analyses Are Straightforward

By reading the Appellate Court's decision or even by reading the briefs of the parties, this case appears complicated. It is not. Appellant filed suit for a violation of 42 U.S.C § 1983 and for malicious prosecution under State common law. The Respondent moved for summary judgment based on his claimed immunity from those suits. The relevant tests to determine if Respondent is entitled to such immunity, stated by countless courts, render such a determination a

straightforward matter.

The analysis to determine whether a defendant is entitled to qualified immunity from a § 1983 suit is:

1) Do the allegations establish that Respondent violated the Constitutional rights of Appellant? *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Answer here: Yes, obtaining an arrest warrant with materially false information that is recklessly or deliberately false voids the warrant and violates the Fourth Amendment. *Franks v. Delaware*, 438 U.S. 154, 156 (1978) (holding that in such a situation the "warrant must be voided. . .to the same extent as if probable cause was lacking on the face of the affidavit").

2) Was the Constitutional right firmly established at the time of the violation? Answer here: Yes, *Franks* had been decided nearly three decades earlier and remains valid law to this day. *Id.*

In this type of case (an arrest pursuant to a warrant obtained by an affidavit containing recklessly or intentionally false information), courts must take one additional step to determine if the evidence – taken in the light most favorable to appellants claims – could allow a reasonable juror to conclude that the Constitution has actually been violated (as opposed to merely alleged) pursuant to existing Fourth Amendment jurisprudence:

3) If the recklessly false information is removed or corrected, does "***the affidavit's remaining content***" still establish probable cause? *Id.* (emphasis added); *Bagby v. Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996). Answer here: No, it doesn't.

This last step of the test does require some additional analysis, in that it is actually a two-part test. But, it is still a straightforward test that can be addressed without resorting to irrelevant or complicated issues. First, the court must determine if the affidavit contained recklessly or intentionally false information. *Bagby v. Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996) (quoting *Franks*, 438 U.S. at 171). Although Respondent claims that this case involves only semantic issues surrounding the use of the specific words "slammed" and "threw," that is a mischaracterization of Appellant's contentions designed to make the Appellant's position easier to attack (also known as the "straw man argument" logical fallacy). Appellant's complaint is not that single words were changed, but that the meaning or substance of what she said was changed to claim or imply that she had confessed to actions she never confessed to.[1] There can be no candid argument that

[1] Because any reckless misstatement is sufficient to proceed with the analysis, Appellant will forego an extended discussion of the second statement and will only state that the problems with Respondent's account are 1) the mechanism of injury described by Appellant was that the child "slipped and fell" and had little to

the first statement at issue was not recklessly misstated in the affidavit, just as the Appellate Court below found. Appellant described a hypothetical accident which could have occurred without her knowledge that might explain the injury. Respondent agrees that he understood her statement in that light. LF p. 119 (Ex. p. 60-61). Yet, no more than a few hours later, he swore under oath that Appellant had "admitted" to "slamming the child's head into a doorknob out of anger." This portion of the affidavit is at least recklessly false.

Once the court determines that the affidavit contains recklessly false information, the court must either remove the misstatements or correct them and then determine if the *four corners of the corrected affidavit* still establishes probable cause. *Franks*, 438 U.S. at 156 (requiring a determination if that "affidavit's ***remaining content*** is" sufficient to establish probable cause) (emphasis added); see also *Odom v Kaizer*, 2014 WL140037 (D.N.D. March 3, 2014) and

---

nothing to do with how the child was lifted into the bathtub; and 2) The statement attributed to her in the probable cause statement strongly implies an intentionality to her actions when she described an accident. The difference between what Appellant actually said and "throwing" a child into a bathtub was apparent to Detective Bartlett, who followed up her statement by asking if the truth was really that she had just thrown the child in the tub, which she expressly denied. LF p. 59 (Ex. p. 51).

Ladd v. Pickering, 2010 WL3892139 at *8 (E.D. Mo. Sept. 29, 2010) (refusing to consider evidence not found in the affidavit to determine probable cause for immunity purposes). Here, a "corrected affidavit" would only establish that Appellant's child had unexplained injuries; that Appellant did not know how the eye injury occurred; and that Appellant stated the injury to the child's mouth occurred when the child slipped and fell in the tub. Those residual facts do not establish probable cause that any crime has been committed, much less a felony. Therefore, Respondent is not entitled to qualified immunity from Appellant's § 1983 claim.

The qualified or official immunity analysis regarding Appellant's malicious prosecution claim is even more direct. Official immunity protects officials for their negligent actions in making discretionary decisions in the course of their official tasks. *Davis v. Lambert-St. Louis International Airport*, 193 S.W.3d 760, 763 (Mo. 2006). Official immunity does not protect government officials from gross negligence or reckless conduct. See *Id.* (describing the immunity as protecting only "ordinary negligence"). Here, Respondent's discretionary act complained of is his reckless or intentional disregard for the truth in initiating the prosecution of Appellant for felony child abuse, for which there was no probable cause. It is not a matter of ordinary negligence to recklessly or intentionally disregard the truth. Official Immunity does not protect officials from reckless conduct and therefore

does not protect Respondent. Though it is true that Appellant has also maintained that Respondent acted intentionally and with malice, and it is true that such evidence would also defeat a claim to official immunity, this analysis is completely unnecessary because official immunity does not protect reckless conduct.

In short, applying the correct tests for the immunities that are the subject of the Respondent's summary judgment motion is a straight forward matter. When the proper tests are applied, Respondent is not entitled to qualified immunity or official immunity in this case and this case should be remanded for jury trial.

III. Additional Issues That Have Been Raised

Although the above analysis is the correct approach to this case and all that need be addressed by this Court, the Respondent and the courts below have raised many issues that – although they may initially seem related to the issues before the Court - ultimately are not relevant to this Court's decision. Appellant will attempt to briefly explain such issues and why these arguments need not be addressed by this Court.

a. This Case Requires a Jury and Summary Judgment is Inappropriate.

Although Appellant believes Respondent's probable cause statement exhibited a reckless disregard for the truth (if not an intentional disregard therefore) and that a corrected affidavit fails to establish probable cause of any

crime, much less a felony, this court does not necessarily have to agree with those propositions to determine that summary judgment is inappropriate in this case. Where reasonable jurors could disagree as to whether the officer was reckless or other predicates to immunity have been satisfied, a jury is required to resolve which inference is the correct one. *Ladd v. Pickering*, 2010 WL3892139 at *6 (E.D.Mo. Sept. 29, 2010) ("Summary judgment must be denied under these circumstances as the record is susceptible to competing, reasonable inferences that must be resolved by a jury."). Really, this proposition is nothing more than the appropriate standard of review at summary judgment. Where multiple reasonable inferences can be drawn from the facts, the reviewing court must adopt the reasonable inferences most favorable to the non-movant for the purposes of summary judgment. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993).

Respondent claims that Appellant's right to have a jury determine between multiple reasonable inferences amounts to Appellant asking the court to weigh on the "credibility" of witnesses. That is incorrect. Rather, Appellant asks this court to view the facts and the reasonable inferences therefrom in the light most favorable to Appellant's claims. When so viewed, any arguments about multiple interpretations of words or what specific phrases mean, how they could be interpreted, or whether the probable cause statement implied a confession to

intentional conduct and other similar matters disputed in this case must all be viewed in the reasonable light most favorable to Appellant's claims. *Id.* This is categorically different that asking the court to evaluate the credibility of any testimony or witness.

Here, reasonable judges (the trial court and the three Appellate Court Justices below) have reached different inferences from the facts regarding whether the officer's probable cause statement demonstrated a reckless disregard for the truth. Given that three Appellate Court justices believed Respondent's probable cause statement exhibited a reckless disregard for the truth, one would think a reasonable juror could also conclude that the Respondents' probable cause statement showed a reckless disregard for the truth.

It is true that Missouri cases hold that, where the facts are not in dispute, the existence of probable cause is for the court to determine. *Simpson v. Indopoco, Inc.*, 18 S.W.3d 470, 474 (Mo. App. W.D. 2000). Here, however, no court has yet made a determination of probable cause based on the four corners of a corrected affidavit, which is the only probable cause determination relevant here.

To the extent that Missouri refuses to adopt the "more than one reasonable inference" approach to probable cause determinations in civil cases, Appellant believes such a rule is ripe for re-examination and reversal (though the court should not need to reach the issue in this case because a corrected affidavit fails to

establish probable cause of any crime). Missouri's approach seems to preclude a jury from determining what the correct inference is regarding probable cause where more than one reasonable inference exists under the same facts. *Id.* Probable cause, particularly, is a "common sense" and "practical" standard that is well within the capabilities of jurors to make proper decisions. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (holding that the probable cause decision is "a practical, common-sense decision . . . given all the circumstances set forth in the affidavit"); See also, M.A.I. 23.07 and 16.05 (requiring jurors determine the existence of probable cause in a malicious prosecution case).

On any other similar issue, if more than one reasonable inference is possible, a jury must decide the issue; even regarding "legal" issues, such as negligence. See, e.g., *Rittgers v. Kansas City Transit Co.*, 427 S.W.2d 294, 298 (Mo. App. 1968) (holding that negligence is a jury question even where facts are undisputed unless there is only one reasonable inference that can be drawn). The approach of allowing a jury to determine whether or not probable cause existed where more than one reasonable inference is possible also seems far more consistent with Fourth Amendment law, which acknowledges that "[r]easonable minds frequently may differ on the question" of the existence of probable cause - even given the same set of facts. *U.S. v. Leon*, 468 U.S. 897, 914 (1984). Missouri's approach that probable cause is a question for the court where facts are undisputed - even where

those facts are susceptible to more than one reasonable inference and conclusion as to the existence of probable cause - would seem make the judge a finder of fact at summary judgment, essentially requiring a judicial trial to determine a Plaintiff's right to a jury trial. Such a procedure would seem particularly inappropriate where the existence of probable cause is a subjective determination that reasonable judges can frequently disagree on. See *Id.* The result of this approach is that a Plaintiff's ability to reach a jury on a malicious prosecution claim could vary greatly due to what judge was hearing the case rather than objective legal standards.

But, here, the only probable cause determination before the court is whether or not the four-corners of the corrected affidavit establishes probable cause. It does not. The Court need not and should not deal with questions of probable cause in this case beyond that determination.

b. Probable Cause Confined to "Four Corners" of Affidavit

The approach urged by Respondent and taken by the Court of Appeals below of looking at evidence not contained in the four corners of the affidavit is contrary to the commands of the Supreme Court of the United States. *Franks*, 438 U.S. at 156 (asking if "the affidavit's remaining content" establishes probable cause); *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 565 and n. 8 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but

not disclosed to the issuing magistrate . . . A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.").

Courts across the country nearly uniformly have held that the "corrected" affidavit cannot include potentially inculpatory information that was not included in the original affidavit when faced with such arguments under substantially similar circumstances. See, e.g., *United States v. Yusuf*, 461 F.3d 374, 387 and n. 12 (3rd Cir. 2006); *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 277-78 (4th Cir. 2004) ("None of these facts. . . appear in Deputy Maldonado's supporting affidavit. . . Our review. . . may not go beyond the information actually presented to the magistrate during the warrant application process"); *Kohler v. Englade*, 470 F.3d 1104, 1111-12 (5th Cir. 2006) ("What Detective Johnson knew but failed to tell Judge Anderson is irrelevant. . ."); *Mills v. City of Barbourville*, 389 F.3d 568, 576 (6th Cir. 2004) ("[T]here is no indication that this knowledge was passed on to the magistrate. The officer's independent knowledge, without some explanation in the affidavit, is insufficient. . ."); *United States v. Harris*, 464 F.3d 733, 738-39 (7 Cir. 2006) ("Allowing the government to bolster the magistrate's probable cause determination through post-hoc fillings does not satisfy the Fourth Amendment concerns addressed in *Franks*."); *United States v. Reinholz*, 245 F.3d 765, 775 (8th Cir. 2001) ("In any case, retroactively supplementing the affidavit with material omissions bolstering probable cause would undermine the deterrent purpose of the

exclusionary rule."); *Baldwin v. Placer County*, 418 F.3d 966 (9th Cir. 2005) ("But what will sustain the warrant must already be within it. The County is pointing to evidence not cited in the warrant. That evidence cannot sustain the warrant."); *Wilkins v. DeReyes*, 528 F.3d 790, 801-02 (10th Cir. 2008) ("But the officers revealed none of the additional information during the institution of legal process . . .the officers cannot use this information to escape liability). In fact, so far as Appellant can discern, only one federal court of appeals has held otherwise. See *Cournoyer v. Coleman*, 297 Fed.Appx. 17, 18 (2nd Cir. 2008)[2].

Appellant is not aware of any Missouri case law that would indicate that Missouri does or should follow the Second Circuit approach as opposed to the rest of the country – nor has any such case law been cited by the courts below or the Respondent. If anything, Missouri case law would seem to strongly suggest that Missouri follows the vast majority of courts in limiting the inquiry to the four corners of the corrected affidavit. See, *State v. Neher*, 21 S.W.3d 44, 49 (Mo. banc 2007) ("In conducting the review of whether probable cause exists, the appellate court may not look beyond the four corners of the warrant application and the supporting affidavits.") (citations omitted); see also, *Long v. State*, 441 S.W.3d 154, 158 (Mo. App. E.D. 2014) ("[T]he court must set aside the false material and

[2] It is worth noting that this citation is the first time that any party or court has located a case that actually supports the approach urged by Respondent.

consider the remaining content in the affidavit to determine whether probable cause existed at the time the warrant was issued. Only if the affidavit's remaining content is insufficient to establish probable cause will the fruits of the search be excluded." (emphasis added) (citing *Franks*, 438 U.S. at 164-65))[3].

If an officer recklessly disregards the truth in a supporting affidavit, the court excises such misstatements or corrects them to make them accurate. *Franks*, 438 U.S. at 164-65. If the remaining content of the affidavit fails to establish probable cause, the Constitution has been violated regardless of what else the officer claims to have known. See *Id.* This is a firmly established constitutional violation. *Id.* If a reasonable juror could conclude that the officer has violated Appellant's firmly-established constitutional right, as here, immunity is inappropriate.

Because nearly every court in the country corrects the affidavit and determines the existence of probable cause based on the four corners of that corrected affidavit and because Missouri law appears to take the same approach

---

[3] Interestingly, these words were penned by the Honorable Glenn Norton, J. and concurred with by the Honorable Clifford Aherns, J., who, together, formed a majority of the Appellate panel below which looked outside the four corners of the affidavit in this case to determine probable cause, a mere seven months after their opinion in *Long*.

and certainly has not previously held that it specifically follows the minority approach of the Second Circuit, the record is woefully incomplete regarding "everything the officer knew" at the time of the warrant application that may have a material effect on a probable cause determination. Should this court decide to follow the Second Circuit, Appellant requests remand to the trial court for a proper record regarding everything known to the officer at the time he submitted the affidavit. If this Court decides to ignore the overwhelming majority of law addressing this issue and follow the minority, and highly questionable, approach of the Second Circuit, it should evaluate this case on a proper record on that subject and not merely on the few facts selectively put forward by Respondent to advance his otherwise irrelevant theory that the Respondent had probable cause if the court looks beyond the four corners of the corrected affidavit.[4]

c. Probable Cause for a lesser offense

---

[4] Respondent cites a number of cases claiming that a determination of probable cause must be made based on a "totality of the circumstances" or similar language in support of his position that the court should evaluate probable cause based on everything known to the officer. The cases cited do not directly address the issue raised here and Appellant can find no indication in those opinions that the courts mean anything other than "the totality of the circumstances" presented in the affidavit.

The Appellate Court below held that, based on evidence not found in the corrected affidavit and without attempting to examine everything known to the officer at the time, that the officer possessed probable cause to arrest Appellant for a misdemeanor. Because of the existence of such claimed probable cause, the Appellate Court below held that the Respondent is entitled to immunity from suit under § 1983. The Appellate Court cited no similarly situated case for its approach, instead relying on cases involving warrantless arrests. Appellant can find no false affidavit cases that appear to address this point specifically. The approach taken by the Appellate Court below would seem to contradict Fourth Amendment jurisprudence, which holds that the filing of a recklessly false affidavit is inherently unreasonable and the court will void such a warrant unless the false information was irrelevant to the probable cause determination. *Franks*, 438 U.S. at 164-65; *Bagby v. Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996) ("A warrant based upon an affidavit containing 'deliberate falsehood' or 'reckless disregard for the truth' violates the Fourth Amendment. An official who causes such a deprivation is subject to § 1983 liability.") (citations omitted).

It would seem quite likely that no Fourth Amendment violation could be found where a corrected affidavit would still establish probable cause sufficient to render the search or seizure that occurred "reasonable," even if it might be for a different offense. This would seem most likely to occur in the context of a search

warrant, where – for instance - the affidavit may request to search for evidence relating to a murder or some such crime but also contains facts that would justify a search warrant for narcotics. In such a situation, even if the facts supporting probable cause to search for evidence of the murder were completely fabricated, so long as the facts that would support probable cause to believe narcotics would be found were truthful, courts may well find that no constitutional violation has occurred and that the officer is entitled to immunity. Although Appellant has not located such a case, in such a situation, it would seem consistent with the Fourth Amendment to hold that the warrant was still valid and that the applying officer would enjoy the protection of qualified immunity because the true facts contained in the affidavit would still have supported a search of the same scope as actually occurred, making it objectively reasonable.

This case is not one where such an unusual scenario exists nor where such a theoretical ruling is warranted or necessary. First, the corrected affidavit does not contain facts that would support a finding of probable cause to believe any crime was committed. Second, even should this court find probable cause existed on the basis of the corrected affidavit, certainly no probable cause would have existed in the corrected affidavit to believe that Appellant committed a felony. Therefore, Appellant was subjected to the increased seizure that is inherently accompanied by being charged with a felony rather than a misdemeanor – including damage to her

reputation, emotional distress caused by exposure to harsher sentences and additional collateral consequences, and an increased bond amount (which, in this case, resulted in Appellant spending significant time in jail). Such restrictions and consequences are considered seizures under the Fourth Amendment. *Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring). It is unreasonable to endure the enhanced seizures associated with being prosecuted for a felony where there is no probable cause to believe the defendant has committed a felony. So, even if the corrected affidavit established probable cause for a misdemeanor, the Respondent's reckless disregard for the truth caused Appellant to be unreasonably charged and subjected to the enhanced seizures associated with being charged with felony. Such an unreasonable seizure violates the Fourth Amendment and Respondent would still not be entitled to qualified immunity.

d. The Fact that Respondent is a Law Enforcement Officer is Irrelevant

Because the Respondent is a police officer, he is entitled to qualified and/or official immunity from suit where circumstances warrant. The fact that he is a police officer has absolutely no effect on the relevant standards and tests to determine if he is entitled to any sort of immunity under a particular set of circumstances. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (explaining the functional approach to immunity). The

Supreme Court of the United States has repeatedly held that courts are to take a functional approach to determinations of § 1983 immunity. *Id.* What is important is the nature of the action, not the identity or job title of the actor. *Id.* Respondent has persistently argued that several cases cited by Appellant are distinguishable because the affiant in those cases was not a police officer. This argument misses the meaning of the United States Supreme Court's decisions in *Harlow* and *Kalina*.

e. It is Irrelevant that the Prosecutor Determines the Charge

Both the Appellate Court below and, now, the Respondent claims that the fact that the prosecutor determines the specific charge to file is relevant to the determination of the officer's immunity from suit for filing a recklessly false affidavit. This argument is a red herring. The same fact is true for every civil suit or suppression hearing regarding an arrest warrant issued upon recklessly or intentionally false information. This argument would only seem to have any application where the prosecutor has "overcharged" a case based on the facts presented to him or her. But, in such a situation, the officer would already be protected by both qualified and official immunity so long as the application he submitted was objectively reasonable.

It should be presumed that both the prosecutor and the judge who review warrant applications will follow the law and not issue warrants where probable cause for that crime does not exist. Certainly, judges and prosecutors are human

and can make mistakes. But, when they do, judges and prosecutors enjoy absolute immunity from suit and officers who have provided an affidavit the charges were issued upon also enjoy immunity, so long as they did not provide recklessly or intentionally false information that caused the warrant to be issued.

Even as a red herring argument, this argument rings especially hollow on the facts of this case. Here, during the interrogation of Appellant, Respondent told Appellant that "I have no doubt in my mind at all you're going to have charges for felony child abuse by the end of the day." LF. p. 57 (Ex. p. 44 ln 6-8). Further, Respondent explained to Appellant at some length that his probable cause statement could be used to help her or hurt her, depending on how he presented the situation to the prosecutor. See, e.g., LF at p. 58 (Ex. 45-46). Finally, Respondent also expressed the importance of his being "confident" that his probable cause statement is "100% what happened." LF at 59 (Ex. p. 49 ln 12-13). Almost immediately thereafter, Respondent wrote a probable cause statement that rendered her statements regarding a hypothetical accident and the child slipping and falling in the tub into "admi[ssions]" that she had intentionally injured her child, allegations she had repeatedly and fervently denied.

Respondent also remarks that the probable cause statement is often prepared in a rush and without the benefit of a typed transcript like this court enjoys. To this, Appellant will just say that Respondent had Appellant on a 24 hour hold and had a

video tape of the interview should he need to review it (which is why we now are able to have a transcript). Respondent was also aware that injustice was the near certain result should he fail to tell the truth, the whole truth, and nothing but the truth in his probable cause statement. LF p. 126.

Respondent – at a minimum – recklessly disregarding the truth when he wrote the probable cause statement at issue in this case. The fact that a prosecutor ultimately chose what specific charge to file based on the recklessly and/or intentionally false facts provided to him is completely irrelevant to this case because the prosecutor and the magistrate cannot perform their function when they are provided with recklessly or intentionally false information by affiants – particularly when the affiant is a sworn police officer, whom we should expect to not recklessly or intentionally disregard the truth.

f. "Arguable Probable Cause" Does Not Apply

The Respondent and the Appellate Court below both refer to the doctrine of "arguable probable cause." This doctrine has no application here. "Arguable probable cause" is a doctrine that exists in warrantless arrest cases. This is a false affidavit case.

It is true that a few false affidavit cases can be found that refer to the concept of "arguable probable cause," such as *Dowell v. Lincoln County, et al.*, 762 F.3d 770, 777 (8th Cir. 2014) (citing *McCabe v. Parker*, 608 F.3d 1068, 1078 (8th Cir.

2010), a warrantless arrest case). However, Appellant has been unable to find a false affidavit case where the court's decision turned on the application of this doctrine. For instance, although the *Dowell* court does mention the concept of "arguable probable cause," it decided the case on the basis that the affidavit would still establish probable cause for the crime charged even with the information added to it that the Plaintiff complained was recklessly omitted. *Id.* at 778.[5]

The mistake of discussing the doctrine of "arguable probable cause" in this and other false affidavit cases appears to stem from a misapplication of the functional approach to immunity outlined in *Harlow* and *Kalina*. The nature or function of the discretionary acts providing qualified immunity determines what act must be viewed objectively for qualified immunity purposes in the respective types of cases. Where the officer is making a warrantless arrest based on his own

---

[5] Appellant is somewhat surprised that Respondent would cite this case. It provides no substantial support for any point raised by Respondent (See *Id.* at 777 ("We therefore determine whether Detective Bartlett's ***probable cause statement*** would still establish probable cause") (emphasis added)) and revolves around the Respondent's former partner and co-investigator/co-interrogator of Appellant, Detective Bartlett, submitting a probable cause statement that conspicuously omitted highly relevant information – even if that information was ultimately deemed immaterial to the probable cause determination.

judgment regarding the existence of probable cause, the decision to arrest is the discretionary act which supplies him with qualified and/or official immunity. Immunity tests are objective ones, so if a reasonable officer in the same situation could have made the same decision to arrest, the officer is entitled to immunity even if his decision was the wrong one. This situation is what is meant by "arguable probable cause." See *McCabe v. Parker*, 608 F.3d 1068, 1078 (8th Cir. 2010).

Here, the *discretionary act* complained of is not the arrest at all, it is the submission of the sworn affidavit containing recklessly or intentionally false information. That is the act that must be judged objectively when considering the officer's immunity. See *Bagby*, 98 F.3d at 1099 ("This prong of Franks is governed by an objective standard that is quite amenable to qualified immunity review – whether the warrant affidavit was so materially false that defendant manifested reckless disregard for the truth in submitting it."). That is why *Franks* and the civil false affidavit cases require that the false facts be recklessly or intentionally false – because a reasonable man can be merely negligent. It is the same objective test expressed differently because it is applied to a different discretionary act or "function." So, the only question here relating to the objective reasonableness of Respondent is if a reasonable officer could have believed this affidavit was true and accurate. No reasonable officer could believe that the probable cause statement

was an accurate or fair summary of the statements of Appellant.

IV. Conclusion

Respondent recklessly disregarded the truth in his affidavit. The recklessly false facts caused the unreasonable seizure of Appellant for felony child abuse charges. This constitutional violation was firmly established at the time Respondent submitted his recklessly false affidavit. Respondent is not immune from this suit.

/s/ John D. James
John D. James #61070MO
James Law Group, LLC
Attorney for Appellant
Deanna M. Copeland
14 Richmond Center Court
St. Peters, MO 63376
Tel: (636) 397-2411
Fax: (636) 397-2799
cjlaw@charliejames.com

CERTIFICATE OF SERVICE

A copy of the above and foregoing was via electronically filed to: Mr. Joel Brett, Attorney at Law, 211 North Third Street, St. Charles, MO 63301- 2812 on this 20th day of March, 2015.

/s/ John D. James
John D. James

ATTORNEY CERTIFICATION

I, John D. James, certify to the Court the following:

1. The attached brief complies with the limitations contained in Rule 84.06(b).

2. The attached brief contains 5,763 words, not including the certificate required by Rule 84.06(c), and signature block.

/s/ John D. James
John D. James #61070 MO
Attorney for Appellant
Deanna Marie Copeland
14 Richmond Center Ct.
St. Peters, MO 63376
Tel: (636) 397-2411
Fax: (636) 397-2799
cjlaw@charliejames.com